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July 12, 2013

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Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
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Autorité des marchés financiers
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
New Brunswick Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

c/o
The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, ON M5H3S8
comments@osc.gov.on.ca

Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: Request for Comment – Proposed National Instrument 62-105 *Security Holder Rights Plans*, Proposed Companion Policy 62-105CP *Security Holder Rights Plans* and Proposed Consequential Amendments

This letter is provided to you in response to the Notice and Request for Comment – Proposed National Instrument 62-105 *Security Holder Rights Plans*, Proposed Companion Policy 62-105CP *Security Holder Rights Plans* and Proposed Consequential Amendments (the "**Proposed Rule**") published at (2013) 36 OSCB 2643.

We commend the Canadian Securities Administrators (the "**CSA**") for its initiative in addressing the treatment of shareholder rights plans in Canada. The Proposed Rule is preferable to the status quo because hearings before securities regulators to cease trade a rights plan under the current bid regime result in uncertainty as to the timing of bids, detract the attention of both targets and bidders from the transaction at hand, and

typically have marginal impact on the actual outcome of the bid itself. Deal certainty and allocation of regulatory resources militate convincingly in favour of Canadian securities regulators "getting out of the business" of cease trading rights plans.

Although we support the Proposed Rule, it does potentially give rise to new issues. While the Proposed Rule should eliminate the case-by-case intervention of Canadian securities regulators, it is likely, at least in the short term, to replace that intervention with litigation before the Canadian courts. As the ability of a bidder to acquire shares will hinge on the elimination of a rights plan by shareholder vote, the timing and conduct of the shareholder meeting to approve or remove a rights plan will become critical to the bidder, the target and potential interlopers. In that regard, it would not be surprising if litigation before the courts over these matters emerged following the implementation of the Proposed Rule. Further, as with inconsistent judgments of securities regulators, which has been an unwelcome feature of rights plan adjudication, there is the risk of inconsistent court judgments between jurisdictions.

The Proposed Rule also introduces empty voting into the take-over bid context. Under the Proposed Rule, the status of a rights plan, and the ability of shareholders to tender to a bid, will be determined by a vote at a shareholders meeting. Under Canadian corporate statutes, the record date holder is entitled to vote and the record date must be at least 21 days in advance of the meeting, and in practice is often 30 days or more. Record date shareholders that have disposed of their shares and no longer have any interest in the target corporation will help determine the fate of shareholders that may wish to tender to a bid. In addition, it would be expected that more shareholders would make a decision on a tender than a decision on a vote to remove a rights plan. Since a key objective of the CSA is to continue to give effect to shareholder primacy in the context of a take-over bid, a methodology that focuses on shareholders actually owning the shares and deciding the fate of the bid at the relevant time is superior to the shareholder voting model of the Proposed Rule.

Accordingly, we recommend that the CSA consider a "permitted bid" alternative to the Proposed Rule that would achieve the same objectives of the Proposed Rule, is easily implemented and would not give rise to the issues identified above. A "permitted bid" alternative would provide that no rights plan would be effective against a bid that was open for a specified number of days, contained an irrevocable condition providing for a majority tender by independent shareholders and a commitment to extend the bid for an additional 10 business day period following satisfaction or waiver of the bid conditions – in effect, a permitted bid as currently contemplated in almost all Canadian rights plans. A bidder would also be allowed to reduce the deposit period to match any earlier expiry date (or meeting date) for a target board supported transaction.

The benefit of this alternative proposal as compared to the Proposed Rule is that the shareholders that actually own the shares at the relevant time would determine whether a bid would succeed. It would also be consistent with existing rights plan decisions going back to *Lac Minerals*[1] (and, more recently, *Falconbridge*[2]) which would make the rights plan ineffective against a bid if its majority tender condition had been satisfied. Like the Proposed Rule, a permitted bid alternative would get the CSA out of the business of regulating rights plans, without the downside consequence of creating a new forum for disputes before the courts and introducing an unnecessary shareholders meeting into each hostile bid. The requirement for a majority of independent shareholders to tender and the requirement to extend the offer upon satisfaction of the conditions address structural coercion, ensuring that shareholders are not coerced into tendering and mirroring the result of a shareholders meeting as contemplated in the Proposed Rule. The alternative proposal would have certainty as to timing and could be easily introduced as a straight-forward rule. In terms of the number of days a permitted bid must be open for acceptance, alternatives include the 60 days contained in most rights plans today, the 90 day period contemplated by the Proposed Rule and the 120 day period advocated by the Ad Hoc Senior Securities Practitioners Group in their letter dated July 11, 2013. The optimum time period needs to strike the right balance between the interests of bidders and target boards, with a view to achieving an efficient market for corporate control for the benefit of target shareholders.

With regard to amending National Policy 62-202 *Take-Over Bids - Defensive Tactics*, we would welcome a broader review of this policy as part of a review of the role of securities regulators and the courts in the bid regime and commend the AMF for advancing this initiative and sparking a broader enquiry regarding take-over bid regulation and the role of directors, regulators, courts and shareholders. We recognize, however, that alternatives contemplated by such a broader review would take a considerable amount of time to formulate and implement. Adopting the Proposed Rule or the alternative suggested above would provide an immediate improvement to the bid regime in the interim without foreclosing the ability of securities regulators to consider further changes in the future.

We would be pleased to discuss the foregoing or address any of the specific questions set out in the Notice and Request for Comment at the request of the CSA.

Yours very truly,

Osler, Hoskin & Harcourt LLP

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[1] *In the Matter of Lac Minerals Ltd. and Royal Oak Mines Inc.* (1994) 17 O.S.C.B. 4963

[2] *Falconbridge Ltd. (Re)* (2006) 29 O.S.C.B. 6783